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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-206

THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY .. RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY .. RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of *Certiorari* issue to review the Order or Judgment of the United States Court of Appeals for the Sixth Circuit, entered June 4, 1974, denying the Petition of the Petitioners for Writ of Mandamus and/or Writ of Prohibition.

OPINIONS BELOW

The Order or Judgment of the United States Court of Appeals for the Sixth Circuit is unreported and appears in the Appendix hereto, *infra*, page 1a-2a. The Order of the United States District Court for the Eastern District of Kentucky, at Pikeville, remanding the Civil Action styled *Jay Lee Little and Lona Little* vs. *Therntron*

Products, Inc. and Larry Dean Newhard is set forth in the Appendix hereto, *infra*, p. 3a-6a.

JURISDICTION

The Order or Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 4, 1974. The Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED

Whether the Respondent, a United States District Court Judge, can arbitrarily deny the statutory rights of these Petitioners in remanding a diversity action to a state court merely because of a crowded docket, when, by his own admission, the Petition for removal was timely filed and in strict compliance with the statutory provisions for removal of cases, thus conferring jurisdiction upon the District Court.

STATUTES INVOLVED

United States Code, Title 28:

§1441. **Actions removable generally**

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the dis-

trict and division embracing the place where such action is pending.

§1446. **Procedure for removal**

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the district court of the United States for the district and division within which such action is pending a verified petition contaning a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleadings has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

* * *

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond

with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond, the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

§1447. **Procedure after removal generally**

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before if all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State Court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State

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court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On April 9, 1973, Jay Lee Little and Lona Little, citizens and residents of the Commonwealth of Kentucky, commenced an action in the Pike Circuit Court, Pike County, Kentucky, against these Petitioners. Petitioner, Thermtron Products, Inc., is incorporated under the laws of the State of Indiana, with its principal place of business in Indiana, and a citizen and resident thereof. Petitioner, Larry Dean Newhard, is a citizen and resident of the State of Indiana. Service of process upon the Petitioners was obtained by substituted service of process upon the Secretary of State of the Commonwealth of Kentucky, on April 10, 1973.

On April 26, 1973, pursuant to and in strict compliance with the provisions of 28 U. S. C. §1441 and §1446, the Petitioners filed a Petition for Removal in the United States District Court for the Eastern District of Kentucky, at Pikeville, executed a bond for removal, served notice of removal upon the Plaintiffs below, and the Clerk of the Pike Circuit Court, and filed an Answer to the Complaint of the Plaintiffs in Civil Action No. 1723, in the United States District Court for the Eastern District of Kentucky.

It is undisputed, and, in fact, conceded by the Respondent herein that the Petitioners properly re-

moved this action from the Pike Circuit Court to the United States District Court for the Eastern District of Kentucky. Furthermore, it is uncontroverted that the United States District Court for the Eastern District of Kentucky and the Respondent herein properly recognized, assumed, and exercised jurisdiction over the within action, there being no jurisdictional defects whatsoever in the removal thereof nor any objection ever made to jurisdiction by the plaintiffs below.

Nevertheless, on February 5, 1974, more than nine months after the proper removal by the Petitioners, and shortly after the Petitioners had served notice to take the discovery depositions of the plaintiffs below, the Respondent herein, *sua sponte*, entered an Order requiring these Petitioners to show cause why the action should not be remanded to the Pike Circuit Court since "there is no available time in which to try the above styled action in the foreseeable future," despite a finding made by the Respondent that the within action "was removed pursuant to the provisions of 28 U. S. C. §1446."

Petitioners, on February 11, 1974, filed a Response to the aforementioned Order and objected to remand upon the grounds that once it was determined the Petition for Removal complied with the statutory requirements, with respect to jurisdictional allegations, the District Court was vested with jurisdiction and the Petitioners had a statutory right to have the case decided in Federal Court. Petitioners also declared that they did not believe they could receive a fair and impartial trial in the Pike Circuit Court.

On March 22, 1974, the Respondent, District Judge, conceded that these Petitioners "have a right to remove an action brought in State Court if the provisions of 28 U. S. C. §1441 *et seq.* are properly followed," however, the Respondent nevertheless remanded the case to the State court, stating as follows:

> "That right afforded the defendants, however, must be balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action. The Court finds the right to choice of forum to be of little particular consequence. The plaintiffs' right to a speedy decision on the merits of their cause of action is of much greater significance."

As justification for this balancing process, the Respondent cited a heavy case load and crowded docket, with underlying priorities, as evidence of the impairment of the plaintiffs' right of redress. Respondent concluded that the statutory rights of the Petitioners herein would not suffer if this action was remanded.

Petitioners, thereafter, sought extraordinary relief, by Writ of Mandamus and/or Writ of Prohibition, in the United States Court of Appeals for the Sixth Circuit. The relief sought by the Petitioners was founded upon the following principles:

1. It is the exclusive right of the Petitioners, pursuant to 28 U. S. C. §1441, *et seq.*, to remove this action from State court which right may not be substantively or procedurally denied these petitioners, nor may it be "balanced" weighed, or otherwise, against

other discretionary considerations where the action was properly removed in all jurisdictional requirements and in strict compliance therewith.

2. Respondent has no authority, whatsoever, or any discretion to divest the United States District Court for the Eastern District of Kentucky of jurisdiction over the parties or subject matter, where the District court recognized, assumed, and properly exercised jurisdiction, in a case properly removed, where there is no objection, nor question with regard to jurisdiction, and where it is the mandatory duty of the Respondent to retain jurisdiction, once properly determined and exercised as herein done.

3. The Memorandum, Opinion and Order of Remand clearly ignores and violates the mandatory and unambiguous provisions of 28 U. S. C. §1441, *et seq.*, so as to deprive the petitioners of their statutory rights.

Respondent replied to the aforementioned statements by stating, in essence, that removal is but a mere privilage and subject to judicial discretion. Although the Respondent stated that "there is no doubt merit in defendants' argument of being in Federal Court as a matter of right," it was asserted that this does not outweigh the plaintiffs' right to have a reasonably timely trial.

On June 4, 1974, the United States Circuit Court of Appeals for the Sixth Circuit denied the Petition for Writ of Mandamus and/or Writ of Prohibition upon the grounds that it did not have jurisdiction to review the Order of Remand.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE PROPER INTERPRETATION OF 28 U. S. C. §1447 (c) and (d).

Neither the language nor the spirit of 28 U. S. C. §1441, *et seq.* prevents a Circuit Court of Appeals or this Court from exercising jurisdiction to hear and decide a case which has been wrongfully remanded. To hold otherwise is to grant District Court Judges unbridled discretion to remand for which there would be no review, and leave non resident removing parties without any remedy.

The consequences and ramifications of permitting unlimited discretion to remand diversity cases, without the possibility of judicial review, are most apparent. The inequity and denial of a statutory right are even more obvious. "Shuffling" Sam Thompson, of Louisville, Kentucky, had his case reviewed on direct appeal, from the Louisville Police Court to this Court. Only by hearing his case was he provided a remedy and an injustice prevented. *Thompson* vs. *City of Louisville,* 362 U. S. 199 (1960). The case of these Petitioners is identical. To follow the course of the Court of Appeals for the Sixth Circuit, in refusing to entertain jurisdiction, would conclusively deny these Petitioners and untold other litigants, in the future, of any possible review or remedy in similar cases, wrongfully remanded. For this very reason, it has been necessary for several Circuit courts of Appeals to

exercise jurisdiction and grant review of Writs of Mandamus.

In *Travelers' Protective Association of America* vs. *Smith*, 71 F. 2d 511 (4th Cir. 1934), the case was duly removed to Federal Court on the ground of diversity of citizenship. The propriety of the removal was never challenged, as in the instant case. After the defendant answered, the plaintiffs filed a written waiver of their right to recover in excess of $3,000.00 and remitted to the defendant any excess. Plaintiffs then moved that the cause be remanded to the State court upon the ground that the action did not exceed the minimum jurisdictional amount. The District Court Judge granted the motion and entered an Order remanding the case, without finding that it had been improperly removed and without anything appearing of record to show that the removal was in any wise improper. Defendant appealed from the Order of Remand and requested leave to file a petition for a Writ of Mandamus. The Circuit Court of Appeals for the Fourth Circuit denied the right of appeal, however, granted leave to file a Petition for Writ of Mandamus. In concluding that the case merited a remedy, when the District Court had improperly remanded the case, the Court made a distinction between remand upon jurisdictional grounds and remand upon other grounds.

> "It is clear that the effect of this statutory provision is to forbid appellate review of an order remanding a case when 'the district court shall decide that the case was improperly removed.' In such case, the order of remand is a final determination of the right to remove and is not reviewable by appeal, mandamus

> or otherwise. And we think that, even though the court may not make an express finding as to improper removal, the order of remand is not subject to review, if upon the record, the presumption can be indulged that the order was made because the court was of the opinion that the removal was improper; for in such case the maxim applies *omnia praesumuntur rite esse acta*. But where, as here, it clearly appears that the order was made, not because the court decided that the cause had been improperly removed, but because of a remittiture entered after it had admittedly acquired jurisdiction, we do not think that either the words or the spirit of the statute prevents our directing that it proceed to exercise that jurisdiction by hearing and deciding the case.
>
> "* * * We have carefully examined the authorities which hold that, because of the provisions of Section 28 of the Judicial Code, mandamus no longer lies to require a district court to hear and determine a case which has been remanded. The language of some of the cases is very broad, but they must be interpreted in connection with the facts under review, and in all of them there was express or implied finding of improper removal. In none of the cases which we have been able to find has it been held that the effect of the statute is to deprive the appellate court of the power to require the trial court to hear and decide a case which has been properly removed and which has been remanded solely on the ground of action taken subsequent to removal which did not affect jurisdiction.
>
> "If the provision of Section 28 of the Judicial Code be construed as forbidding review of an order of remand in a case such as this, a party in the situation of the defendant here will be without remedy; for

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it is settled that in cases to which that provision applies the order remanding the case to the state court is not reviewable even upon appeal from the state court. (Citations omitted). We do not think that it was the intention of Congress that a party entitled to invoke the federal jurisdiction should be without remedy if the court, without a finding express or implied of improper removal, should remand the case to the state court on a ground arising after removal and not affecting jurisdiction. Certainly we do not find in the statutes any evidence of such intention.

"* * * Leave will be granted defendant to file a petition for writ of mandamus requiring the court below to hear and determine the case. It will probably not be necessary for defendant to file such petition, as the learned judge may of his own motion vacate the order remanding the case and proceed to hear and decide it." (*Id.* at 512-513).

In *Bankers Securities Corp.* vs. *Insurance Equities Corp.*, 85 F. 2d 856 (3d Cir. 1936), the Third Circuit Court likewise noted a distinction between remand upon jurisdictional grounds and remand upon procedural grounds, holding the latter reviewable by mandamus. In that case, the parties agreed to extend the time limits within which the plaintiff could file a reply to the answer and counterclaim of the defendant. After the time for the original pleadings had expired, but before the stipulated extension of time had run, the plaintiff petitioned for removal. The District Court remanded the case upon the grounds that the extension of time for pleading did not extend the time for removal. Upon petition for a Writ of Mandamus the Circuit Court of Appeals for the

Third Circuit granted review thereof. The reasoning of the Court, at page 859, is as follows:

"If the order remanding the cause to the State court was based upon the ground that it had been 'improperly removed' because the federal court had no jurisdiction, it is not reviewable by appeal, writ of error, or mandamus . . . . In such case, the order would be a final determination of the issue. But, if the order remanding the cause was based upon procedural grounds, not affecting the jurisdiction of the Court, it may be reviewed by mandamus. *Travelers Protective Association* vs. *Smith* (C. C. A.) 71 F (2d) 511, 512. Section 28 of the Judicial Code is jurisdictional, authorizing the removal of certain kinds of causes to be removed into the federal court and Section 29 is procedural, providing how and when such causes may be removed. From an order remanding a cause arising under Section 28 there is no review, but from an order remanding a cause on procedural grounds under Section 29, there may be a review. This is perfectly plain from the reasoning, logic, and direct statements made in the case of Ayers vs. Watson, 113 U. S. 594, 598; . . . .

The Circuit Court of Appeals for the Sixth Circuit, in *Direct Transit Lines* vs. *Local Union, No. 406*, 199 F. 2d 89 (6th Cir 1952), has stated that a cause, removed to District Court, should not be remanded if it were properly removable upon the record as it stood at the time of the filing of the petition for removal. It is, therefore, clear that the Sixth Circuit ignored and refused to consider a basic principle previously espoused. Although the *Direct Transit Lines case, supra*, was partially dis-

tinguished in *Hat Corp. of America* vs. *United Hatters, etc.*, (D. C. Conn.) 114 F. Supp. 890 (1953), the proposition that a case should not be remanded if properly removed still stands in the Sixth Circuit.

Although Petitioners recognize that if an action is improvidently removed and jurisdictionally defective, no review of an order of remand would lie, such is not the case here. The wrongful Order of Remand, entered by the Respondent, was not founded upon informed judicial determination that the removal was improvident, or that the District Court lacked jurisdiction, or any other legal conclusion but was arbitrarily based upon considerations of docket priorities and impairment of the plaintiffs' right of redress. Despite the decision of the Court of Appeals for the Sixth Circuit in *Stein's Stores* vs. *Taylor,* 216 F. 2d 439 (6th Cir. 1954), wherein the Court declared that a Writ of Mandamus is not available to review the legal conclusions of a District Court in remanding a cause to a State court, the petitioners submit that the Order of Remand, in the instant action, was not based upon any legal conclusions, but only upon certain considerations which have no legal foundation in the statutory scheme. Thus, the conclusion of the Circuit Court of Appeals for the Sixth Circuit that it had no jurisdiction to review the wrongful Order of Remand is in conflict with the decisions of the Third and Fourth Circuit Courts of appeals and with the principles enunciated by the Sixth Circuit itself.

II

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT CONCLUSIVELY DEPRIVED THE PETITIONERS OF ANY REMEDY, WHATSOEVER, AND TOTALLY FAILED TO RESOLVE THE RECURRING ARGUMENT OF WHETHER A DISTRICT COURT JUDGE IS CONSTRAINED TO RETAIN JURISDICTION OVER DIVERSITY ACTIONS, PROPERLY REMOVED, AND FORBIDDEN TO ARBITRARILY REMAND SUCH ACTIONS UPON PURELY DISCRETIONARY GROUNDS, OTHER THAN NON-WAIVABLE JURISDICTIONAL DEFECTS, WHICH RECURRING ARGUMENT GREATLY AFFECTS FEDERAL JURISDICTION IN THE DISTRICT COURTS.

Petitioners, as admitted by the Respondent herein, properly removed this action in strict compliance with all statutory and jurisdictional requirements. Respondent arbitrarily remanded the action upon purely discretionary grounds, after having previously properly assumed and exercised jurisdiction. The refusal of the Circuit Court of Appeals for the Sixth Circuit to accept jurisdiction and determine the issue involved herein granted continued and unlimited discretion to the Respondent and other District Court Judges to remand cases, even though properly removed, as they see fit. In so doing, the Circuit Court of Appeals for the Sixth Circuit has also prevented these Petitioners from obtaining any review, whatsoever, of the purely discretionary decision of the Respondent. The denial of review to these Petitioners is unconscionable. Furthermore, to permit such unbridled discretion would certainly have considerable impact upon

Federal Jurisdiction, not only within the Sixth Circuit, but throughout the nation.

The argument pronounced in Judicial decree by the Respondent has recurred in various courts, however, that contention has been consistently rejected.

In *Romero* vs. *ITE Imperial Corporations*, 332 F. Supp. 523 (D.C.P.R. 1971), a timely petition for removal was filed on January 19, 1971. On July 7, 1971, the plaintiff filed a motion to remand based upon the grounds that a remand would speed up the proceedings and would therefore be in the interest of justice. The Court stated, at page 526, as follows:

> "The right to remove an action from a state court to the Federal District Court is a *statutory* right and it is a right that has existed since the original Judiciary Act of 1789. (Citations omitted) 'The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.' (Citation omitted).
>
> *Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct . . . Once the statutory requirements for the right of removal have been met, this court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff.*" (emphasis added).

In *Vann* vs. *Jackson*, 165 F. Supp. 377 (E. D. N. C. 1958), the Court addressed the issue of discretionary authority to remand, at pages 380-381, as follows:

> "[T]he proposition has been advanced that the court has discretionary power to remand this case to the state court, even though properly removed to the federal court. In considering this question, the court must exercise care to determine that a discretionary power does exist, and that it will be in the interest of justice to exercise such discretion.
>
> * * * Since there is no means for reviewing an order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (Citation omitted). The court is without power to remand if no discretionary power exists.
>
> * * * It is concluded that where congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, *no discretionary power exists to remand the case to the state court.*" (emphasis added).

In *Isbrandtsen* vs. *District 2, Marine Engineers Beneficial Association, AFL-CIO*, 256 F. Supp. 68 (E. D. N. Y. 1966), the District Judge gave short shrift to the argument that despite the Court's jurisdiction, that it had discretion to remand, at page 77, as follows:

> "The Union urges the court to remand to the state court despite a finding that it has jurisdiction. It advances a most unusual argument. It agrees that, regardless of the forum, federal law should and will be applied. . . . It assumes that despite a finding of federal court jurisdiction, this court has the discretionary power to remand and reminds the court that, should it remand, its order would not be sub-

> ject to review. . . . Having jurisdiction, this court, in my view, has no discretionary power to remand in a case such as this which does not call for the application of the doctrine of abstention. Even if there were such a discretionary power, the Court would not exercise it in favor of a remand."

In *Davis* vs. *Joyner,* 240 F. Supp. 689 (E. D. N. C. 1964), the identical question presented in the case of *Vann* vs. *Jackson, supra,* and *Larkin* vs. *Roseberry,* 54 F. Supp. 373 (E. D. Ky. 1944), was presented to the Court. The court, therein, stated, at page 691, that the court's authority to remand is found in Title 28 U. S. C. §1447 (c) and provides that the District Court shall remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case in that instance, and it is certainly not the case, in the instant action.

The statutory right of removal is a valuable right which must be protected by the District Courts. *Home Insurance Co.* vs. *Morse,* 20 Wall 445, 22 L. Ed. 365 (1874); *Muller* vs. *Lyke Coastwise Line,* 144 F. Supp. 135 (S. D. Tex. 1940); and *Gentle* vs. *Lamb-Weston, Inc.,* 302 F. Supp. 161 (N. D. Maine 1969). Thus, when a District Court is presented with an action of which it has cognizance it may not turn the matter over for adjudication to the State court. *Mach-Tronics, Incorporated* vs. *Zirpoli,* 316 F. 2d 820 (9th Cir. 1963).

It is readily apparent that the recurring argument, propounded by litigants in favor of granting discretionary power to remand, has been consistently rejected by

District Court Judges. Respondent is apparently the first District Court Judge to actually infer such discretionary power, *sua sponte,* to remand or infer such discretionary power from the statutory provisions, where such discretion is not founded upon any legal basis or jurisdictional basis but solely upon discretionary considerations. Such discretion cannot be justified. Only if an action is removed "improvidently," which means "wrongfully or without legal basis," and if the District Court is without jurisdiction can a case be remanded. *Harlan Laboratory* vs. *Topp's Chewing Gum,* 131 F. Supp. 262, 267 (E. D. N. Y. 1955). Of course, in those cases removed improvidently and without jurisdiction, the judicial discretion exercised is based upon legal conclusions and not discretionary considerations. Such is certainly not the instant case.

It is, therefore, submitted that these Petitioners be afforded at least a review of the discretionary decisions below. "Remedies for rights are ever favorably extended." 18 Vin. Abr. 521.

CONCLUSION

For the aforementioned reasons, a Writ of Certiorari should issue to review the Order and Judgment of the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

FILED JUN 4 - 1974
JOHN P. HEHMAN, Clerk

No. 74 - 1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERMTRON PRODUCTS, INC.
and
LARRY DEAN NEWHARD, PETITIONERS

vs

HONORABLE H. DAVID
HERMANSDORFER, JUDGE,
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF KENTUCKY, RESPONDENT

ORDER

Before WEICK, EDWARDS and ENGEL, Circuit Judges.

Upon consideration, the petition for a writ of mandamus and/or the petition for writ of prohibition are each hereby denied for the reason that such remedies are not available to review an order of the District Court remanding a case to the state court from which it had been removed. 28 U.S.C. § 1447(d); *United States* v. *Rice*, 327 U.S. 742 (1946); *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940); *In Re Pennsylvania Co.*, 137 U.S. 451 (1890); *Stein Stores* v. *Taylor*, 216 F.2d 439 (6th Cir. 1954).

In our opinion the District Court had jurisdiction to enter the order of remand. We have no jurisdiction to review it.

This matter will be reported to the Circuit Council for the Sixth Circuit, which has supervisory powers over the District Court.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

* * * * * * *

FILED MAR 22 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1723

JAY LEE LITTLE and
LONA LITTLE, PLAINTIFFS,

VS:

THERNTRON PRODUCTS, INC. and
LARRY DEAN NEWHARD, DEFENDANTS,

MEMORANDUM OPINION AND ORDER

This action is before the Court following the defendants' response to an Order of this Court entered herein on February 5, 1974 which required the defendants to show cause as to why the ends of justice do not require this matter to be remanded to the Pike Circuit Court, Pike County, Kentucky from which it was removed on April 30, 1973.

The defendants contend that they have been granted the right to remove an action brought in state court if the provisions of 28 U.S.C. §1441 *et seq.* are properly followed. The Court must concede that fact.

That right afforded the defendants, however, must be balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action. The Court finds the right to choice of forum to be of little particular con-

sequence. The plaintiffs' right to a speedy decision on the merits of their cause of action is of much greater significance.

At the close of business on February 28, 1974 there were pending on the dockets for which this Court has primary responsibility a total of eighty (80) criminal actions and three hundred ninety-four (394) civil actions. These cases have been assigned various priorities. The first priority is granted criminal actions. Social Security and Black Lung cases[1] have a priority second only to criminal cases. *Webb* v. *Richardson,* 472 F.2d 529, 538 (6th Cir. 1972). A third priority is granted those actions in which the United States is a party. The lowest priority, as a matter of necessity, is assigned private civil actions.

Consequently, the period between the filing of such actions and the time in which they are assigned for trial must, regretably, continually be extended. It therefore is obvious to the Court that the plaintiffs' right of redress is being severely impaired as a result. Such would not be the case if the cause had not been removed from the state courts.[2]

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1. At the present time the Eastern District of Kentucky is experiencing an influx of Black Lung actions. The Department of Health, Education and Welfare predicts that a total in excess of four thousand (4,000) of these actions will ultimately be filed in this District.

2. The Court has been informed that the courts of the Commonwealth are not faced with a large back-log of cases and can dispose of any civil case withone (1) year of the date of filing.

The purpose of the removal statute was specifically to relieve a party of the possibility of local prejudice when faced with a suit in the local courts. It must also be noted that the predecessor of the present removal statute was aptly entitled the Prejudice or Local Influence Act of 1867, 14 Stat. 558. Vol. 1A, Moore's Federal Practice, Para. 0.156[1], p. 42. As the Court has provided the defendants with an opportunity to set forth any possible prejudice that remand could precipitate and no such showing has been made, the Court must conclude that the defendants' right would not suffer if this action were to be remanded.

Accordingly, this action shall be, and the same hereby is, REMANDED to the Pike Circuit Court, Pike County, Kentucky.

The Clerk of this Court shall prepare and mail a certified copy of this order of remand to the Clerk, Pike Circuit Court, Pike County, Kentucky.

IT IS SO ORDERED this 22 day of March, 1974.

/s/ H. David Hermansdorfer
H. DAVID
HERMANSDORFER, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court

By /s/ Dorothy B. Ward
D. C.

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 3/25/74

DAVIS T. MC GARVEY, CLERK

BY: /s/ Dorothy B. Ward D.C.

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